Supreme Court, U.S.
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No. 96-197

In The

Supreme Court of the United States

October Term, 1995

DONALD I. REHMAN,

Petitioner,

vs.

GARWOOD, McKENNA, McKENNA, AND WOLF, P.A. a Florida Corporation, ALLEN J. McKENNA, ESQUIRE, THOMAS C. GARWOOD, JR., ESQUIRE and THEODORE R. BAUMGARDNER, ESQUIRE,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court lacks jurisdiction to grant certiorari since Petitioner failed to file his Petition within 90 days of the final judgment rendered by the highest court of Florida in which a decision could be had as required by 28 U.S.C. § 1257(a) and 28 U.S.C. § 2101(c).

II. Whether Florida courts correctly applied 28 U.S.C. § 1367(d), regarding tolling an applicable state statute of limitations when a federal district court dismisses a "supplemental claim" pending before it, thus providing Petitioner with his federal due process and equal protection rights.

LIST OF PARTIES

All parties to the proceeding in the court below are contained in the caption of this case. Respondent, Garwood, McKenna & McKenna, P.A., is a Florida corporation doing business as a law firm and has no parent companies or nonwholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the highest state court from which a decision could be had is the Florida Fifth District Court of Appeal's opinion issued February 20, 1996. (1a).

Petitioner timely filed a Motion for Rehearing and Motion for Rehearing En Banc. The Florida Fifth District Court of Appeal denied those Motions by Order entered April 2, 1996. (3a).

STATEMENT OF JURISDICTION

It is Respondents' position that this Court lacks jurisdiction to grant Petitioner's Petition. 28 U.S.C. § 1257(a) grants authority for this Court to review by writ of certiorari final judgments or decrees rendered by the highest court of a State in which a decision could be had under enumerated conditions. 28 U.S.C. § 2101(a) provides that a petition for writ of certiorari in a civil action shall be applied for within ninety days after entry of the judgment. The Florida Fifth District Court of Appeal was the highest Florida court in which a decision could be had and rendered it final judgment when it denied Petitioner's Motions for Rehearing on April 2, 1996. Therefore, Petitioner should have filed his Petition within ninety days of April 2, 1996, on or before July 1, 1996. Petitioner's Petition was not filed until July 9, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2101(c)

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a

> civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C. § 1257(a)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set-up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The remaining constitutional and statutory provisions involved were set forth by Petitioner.

STATEMENT OF THE CASE

Petitioner, Donald I. Rehman, was employed by ECC International Corporation, a federal defense contractor. At some point in time, prior to May 31, 1990, ECC International Corporation dismissed Mr. Rehman. On May 31, 1990 Mr.

Rehman filed a federal "whistle blower" action in the United States District Court for the Middle District of Florida asserting that ECC International Corporation had dismissed him because of his reporting of alleged contractor fraud to the United States government. ECC International Corporation retained Respondents, Allen J. McKenna and the law firm of Garwood, McKenna & McKenna, P.A., to represent it in Mr. Rehman's federal court action.

During the pendency of that federal court action, in 1990, ECC International Corporation forwarded a "Personnel Separation Notice" to the Department of Defense advising that Mr. Rehman had been dismissed for "misconduct." The "Personnel Separation Notice" was later amended to state that Mr. Rehman had been dismissed for "poor job performance."

On June 12, 1991, Mr. McKenna, in his capacity as counsel for ECC International Corporation in Mr. Rehman's "whistle blower" action, sent approximately 108 identical letters to employees and former employees of ECC International Corporation advising them of the pendency of Mr. Rehman's "whistle blower" action and informing them that they might be contacted by Mr. Rehman. Mr. Rehman asserts that these letters were defamatory and these letters, along with the "Personnel Separation Notice" form the basis of Mr. Rehman's libel action against Respondent in the court below.

On August 12, 1992, Mr. Rehman filed a motion in the "whistle blower" action seeking leave of court to add Mr. McKenna and his law firm as defendants, asserting that because of the "Personnel Separation Notice" and the 108 letters, Mr. McKenna and his law firm had libeled Mr. Rehman. On August 20, 1992, the federal district court denied Mr. Rehman's motion, holding that the case was already over-burdened by multiple parties and multiple claims and that if Mr. Rehman wished to

pursue his action against Mr. McKenna or his law firm, he would need to do so by separate action. Ultimately, the district court ruled as a matter of law that the 108 letters were not defamatory.

On August 31, 1992, Mr. Rehman filed a second federal court action, this time against Mr. McKenna and his law firm alone. Mr. Rehman attempts to assert a cause of action for libel based on the publication of the 108 letters. On September 22, 1992, Mr. McKenna and his law firm filed a motion to dismiss advising Mr. Rehman and the court that the district court lacked subject matter jurisdiction over the libel action since no federal question was involved and there was no diversity of citizenship between Mr. Rehman and Mr. McKenna and his law firm. On October 7, 1992, the district court dismissed Mr. Rehman's action for lack of subject matter jurisdiction. Mr. Rehman appealed, and on May 25, 1994, the Eleventh Circuit Court of Appeals affirmed.

On May 30, 1994, almost three years after the publication of the 108 letters and four years after the publication of the "Personnel Separation Notice", Mr. Rehman filed an action in the Circuit Court in and for Orange County, Florida against Mr. McKenna and his law firm. On September 16, 1994 Mr. Rehman filed an Amended Complaint naming as additional defendants Mr. McKenna's law partner, Thomas C. Garwood, Jr. and ECC International Corporation's in-house attorney, Theodore R. Baumgardner.

Mr. Rehman became dissatisfied with rulings made by the trial court and sought to have the trial judge disqualified. The trial judge denied Mr. Rehman's motion to disqualify and Mr. Rehman sought appellate review of that order in the context of a petition for writ of prohibition addressed to the disqualification issue. The appellate court denied the petition for writ of prohibition and the case proceeded before the trial judge

assigned to the case. Ultimately, the trial court entered summary judgments on behalf of all defendants, expressly finding that Florida's two-year statute of limitations applicable to defamation actions had expired before Mr. Rehman's action was filed in state court. (5a-7a).

Mr. Rehman appealed the trial court's summary judgments to the Florida Fifth District Court of Appeal. All of the issues which Mr. Rehman seeks to have this Court address were fully briefed and argued to the Florida Fifth District Court of Appeal. That court affirmed the trial court's entry of summary judgments on behalf of all Respondents and did so by means of a "per curiam affirmed" opinion. (1a). That opinion was entered on February 20, 1996. A timely motion for rehearing and motion for rehearing en banc were filed and on April 2, 1996, the Florida Fifth District Court of Appeal denied those motions. (3a).

Thereafter, Mr. Rehman sought review in the Florida Supreme Court. The Florida Supreme Court dismissed the appeal for lack of jurisdiction but ordered that Mr. Rehman could, by motion to reinstate, establish the jurisdiction of that court to entertain his appeal. (11a). Mr. Rehman subsequently filed a jurisdictional brief which the Florida Supreme Court treated as his motion for reinstatement. Thereafter the Florida Supreme Court denied Mr. Rehman's motion to reinstate and allowed the dismissal for lack of subject matter jurisdiction to stand. (13a). Respondents herein filed a motion for attorneys fees in the Florida Supreme Court arguing that because the Florida Supreme Court clearly lacked subject matter jurisdiction, Mr. Rehman's appeal to that court was frivolous. (15a-18a). The Florida Supreme Court granted the motion for attorneys fees. (19a). Mr. Rehman has filed a motion for rehearing directed to that order and the Florida Supreme Court has not yet ruled on the motion for rehearing.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO GRANT CERTIORARI SINCE PETITIONER FAILED TO FILE HIS PETITION WITHIN NINETY DAYS OF THE FINAL JUDGMENT RENDERED BY THE HIGHEST COURT OF FLORIDA IN WHICH A DECISION COULD BE HAD AS REQUIRED BY 28 U.S.C. § 1257(a) AND 28 U.S.C. § 2101(c).

This Court's jurisdiction to entertain a petition for writ of certiorari from a final judgment or decree rendered by a state court is prescribed by statute. Specifically, 28 U.S.C. § 1257(a) provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set-up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The time for filing a petition for writ of certiorari from a final judgment or decree of a state court is governed by the provisions of 28 U.S.C. § 2101(c). That statute provides as follows:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Thus, when the highest court of a State in which a decision could be had has rendered its final judgment or decree, a party seeking review in this Court, must file his petition for writ of certiorari within ninety days of the entry of the State judgment or decree unless a justice of this Court has extended the time for a period not exceeding sixty days.[1] In the instant case, the highest court of Florida in which a decision could be had was the Florida Fifth District Court of Appeal. That court rendered its final judgment on April 2, 1996 when it denied Mr. Rehman's motion for rehearing and motion for en banc rehearing directed to that Court's February 20, 1996 opinion affirming the trial court's entry of summary judgment in favor of the Respondents herein. If April 2, 1996, the date on which the Florida Fifth District Court of Appeal denied Mr. Rehman's motion for rehearing is treated as the date on which the highest court of Florida in which a decision could be had rendered its final judgment, his Petition for Writ of Certiorari should have been filed in this Court on or before July 1, 1996, ninety days after the final judgment was rendered. 28 U.S.C. § 2101(c). Mr. Rehman's Petition for Writ of Certiorari was not filed until July 9, 1996.

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1. Mr. Rehman has not sought and no justice of this Court has granted an extension for the filing of the instant Petition.

This Court has held that where the time within which a Petition for Writ of Certiorari must be filed is established by Congress, the timely filing of a petition is a prerequisite to this Court's jurisdiction. *See Schacht v. United States*, 398 U.S. 58, 65, 90 S. Ct. 1555, 26 L. Ed. 2d 44 (1970) (concurring opinion of Justice Harland); *Matton Steamboat Co., Inc. v. Murphy*, 319 U.S. 412, 63 S. Ct. 1126, 87 L. Ed. 1483 (1943); *Department of Banking v. Pink*, 317 U.S. 264, 63 S. Ct. 233, 87 L. Ed. 254 (1942); *Citizen's Bank v. Opperman*, 249 U.S. 448, 39 S. Ct. 330, 63 L. Ed. 701 (1919) ("In the absence of language provided for waiver, we have without exception treated the statutory limitations as jurisdictional."). Pursuant to 28 U.S.C. § 2101(c), Congress has set the time for invoking this Court's jurisdiction in civil cases and, therefore, the statutory limitations is jurisdictional. Justice Harland, in *Schacht*, stated:

> Nor do I find it at all anomalous that this Court on occasion waives the time limitations imposed by its own Rules and yet treats time requirements imposed by statute as jurisdictional. As a matter of statutory interpretation, the Court has not presumed the right to extend time limits specified in statutes where there is no indication of a congressional purpose to authorize the Court to do so. Because we cannot "waive" congressional enactments, the statutory time limits are treated as jurisdictional.

398 U.S. at 68-69.

Thus, if the April 2, 1996 Florida Fifth District Court of Appeal order constitutes the rendition of the final judgment of the highest court of Florida in which a decision could be had, Mr. Rehman has missed the statutory and jurisdictional filing

deadline. Thus, this Court lacks jurisdiction. It is Respondents' argument that the Florida Fifth District Court of Appeal was the highest court of Florida in which a decision could be had in Mr. Rehman's action below. Mr. Rehman asserts in his Petition that the Florida Supreme Court's rejection of his attempted appeal to that court was the judgment of the highest state court in which a decision could be had. Under Mr. Rehman's argument, the time for filing his Petition for Writ of Certiorari did not begin to run until June 10, 1996, the date on which the Florida Supreme Court denied his motion for reinstatement. However, as will be shown below, the Florida Supreme Court never had jurisdiction to entertain Mr. Rehman's appeal, never accepted jurisdiction, and never passed upon the merits of Mr. Rehman's claims. Therefore, the judgment of the Florida Fifth District Court of Appeal, rendered on April 2, 1996, was the final judgment of the highest court in Florida in which a decision could be had.

Article V, Section III of the Florida Constitution sets forth the parameters of the Florida Supreme Court's subject matter jurisdiction. That constitutional provision provides that the Florida Supreme Court has jurisdiction only in those cases involving: the imposition of the death penalty; a district court of appeal's declaration that a state statute or provision of the state constitution is invalid; the validation of bonds or certificates of indebtedness; an action of a state-wide agency relating to rates or service of utilities; a decision of a district court of appeal certifying a question to be of great public importance or in direct conflict with a decision of another district court of appeal; an order or judgment of a trial court certified by a district court of appeal to be of great public importance; or question of law certified by the United States Supreme Court or a United States Court of Appeals to be determinative of a cause pending before such court; or a district court of appeal's decision that expressly declaring valid a state statute; a district court of appeal's decision expressly construing a provision of the state or federal

constitution; a district court of appeal's decision that expressly affects a class of constitutional or state officers; or a district court of appeal's decision that expressly and directly conflicts with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law.

In the Florida Supreme Court, Mr. Rehman did not cite any constitutional provision or other authority which would have provided the Florida Supreme Court with jurisdiction to entertain his appeal. The clearest expression of Mr. Rehman's argument that the Florida Supreme Court had jurisdiction was contained in his jurisdictional brief when he stated:

> While probably all of the litigants represented by counsel, in their jurisdictional briefs to this Court, dwell upon their perception of why they believe the court has jurisdiction, perhaps for this pro se's case it would be helpful to this Court if the matter is approached from the "surely jurisdiction must exist at the Florida Supreme Court" aspect.

Mr. Rehman's "surely jurisdiction must exist" argument was premised on his belief that the district court of appeal and the trial court had denied him due process and otherwise deprived him of unnamed federal and state constitutional rights as well as on the asserted failure of the district court of appeal and the trial court to apply controlling precedent.

However, Mr. Rehman's assumption fails to recognize the role of the Florida Supreme Court and of the district courts of appeal in Florida's constitutional scheme. Since the amendment to Article V of the Florida Constitution in 1956, by which the district courts of appeal were created, the Florida Supreme Court

has taken the position that it was never intended that the district courts of appeal should be intermediate appellate courts or that the Florida Supreme Court should be a court of last resort in all cases as a matter of right. *See, e.g., Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958). In *Ansin*, the Florida Supreme Court stated:

> The [1956 Amendment] embodied throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Id. The 1980 Amendment to Article V further restricted the Florida Supreme Court's jurisdiction and reaffirmed the principle that in the great majority of cases, the district courts of appeal would be the highest state courts empowered to hear a cause. *See generally Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

Mr. Rehman's attempted appeal to the Florida Supreme Court involves none of the jurisdictional requirements set forth in Article V, Section 3 of the Florida Constitution as discussed above. His case did not involve the imposition of the death penalty, the validation of bonds or certificates of indebtedness, a state-wide agency action relating to rates or service of utilities, or a certified question from this Court or a United States Court of Appeals. The only argument available to Mr. Rehman would be predicated on the opinion issued by the Florida Fifth District Court of Appeal. However, as stated above, the Florida Fifth District Court of Appeal entered an opinion containing the mere

words "per curiam affirmed". That court did not expressly pass upon a constitutional or statutory provision and, therefore, the Florida Supreme Court lacked subject matter jurisdiction to entertain any appeal from that "per curiam affirmed" opinion. On at least two other occasions, this Court has determined that the Florida Supreme Court did not have jurisdiction to entertain an appeal based upon Florida's constitutional scheme as outlined above. *See Nash v. Florida Industrial Commission*, 389 U.S. 235, 88 S. Ct. 362, 19 L. Ed. 2d 438 (1967); *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).

Further, in *The Florida Star v. B.J.F.*, 488 U.S. 887, 108 S. Ct. 499, 98 L. Ed. 2d 498 (1987), this Court certified the following question of Florida law to the Florida Supreme Court:

> Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, § 3(b)(3) of the Florida Constitution or otherwise, to hear Appellant's appeal in this cause from the Florida First District Court of Appeal?

In *The Florida Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988), the Florida Supreme Court answered that question in the affirmative "as delimited by this opinion". *Id.* at 287. In answering the certified question in the affirmative, the Florida Supreme Court stated:

> Instead, we limit our answer to the context in which the question was posed. For that sole purpose, we answer the question in the affirmative. This Court in the broadest sense has subject-matter jurisdiction under article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addresses a question of law within

> the four corners of the opinion itself. That is, the opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests. The opinion *B.J.F.* unquestionably met this requirement.
>
> We premise our holding on our conclusion that article V, section 3(b)(3) creates and defines two separate concepts. The first is a general grant of discretionary subject-matter jurisdiction, and the second is a constitutional command as to how the discretion itself may be exercised. In effect, the second is a limiting principle dictated to this Court by the people of Florida. While our subject-matter jurisdiction in conflict cases is necessarily very broad, our discretion to exercise it is more narrowly circumscribed by what the people have commanded;
>
> * * *
>
> Thus it is not necessary that conflict actually exists for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result. This is the only reasonable interpretation of this constitutional provision.

Id. at 288.

In reaching this answer to the certified question, the Florida Supreme Court specifically addressed the jurisdictional issue which is presently before this Court. In footnote 3 of the Florida Supreme Court's opinion, the court stated:

> This court does not, however, have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and the appeal may be taken directly to the United States Supreme Court.

Id. See also Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981).

Because the "per curiam affirmed" judgment of the Florida Fifth District Court of Appeal in Mr. Rehman's action does not and cannot expressly address a question of law (it contains no opinions or citations), the Florida Supreme Court was without jurisdiction to hear the case and the Florida Fifth District Court of Appeal was the highest court of Florida in which a decision could be had in Mr. Rehman's action. For this reason, the Florida Supreme Court dismissed Mr. Rehman's appeal and awarded attorneys fees for the filing of a frivolous action. Because the Florida Fifth District Court of Appeal was the highest court of Florida in which a decision could be had in Mr. Rehman's case and because that court's final judgment was rendered on April 2, 1996, Mr. Rehman's Petition for Writ of Certiorari should have been filed in this Court no later than July 1, 1996. In fact, Mr. Rehman filed his Petition on July 9, 1996, eight days after the statutory time period provided for in 28 U.S.C. § 2101(c). This Court has long held that the congressionally mandated time

limitations applicable to civil actions is jurisdictional. Therefore, this Court lacks jurisdiction over the instant action.

II.

FLORIDA COURTS CORRECTLY APPLIED 28 U.S.C. § 1367(d), REGARDING TOLLING AN APPLICABLE STATE STATUTE OF LIMITATIONS WHEN A FEDERAL DISTRICT COURT DISMISSES A "SUPPLEMENTAL CLAIM" PENDING BEFORE IT, THUS PROVIDING PETITIONER WITH HIS FEDERAL DUE PROCESS AND EQUAL PROTECTION RIGHTS.

In his Petition for Writ of Certiorari, Mr. Rehman lists nine questions presented, all seemingly asserting that his federal constitutional rights to due process and equal protection were deprived by Florida courts. Mr. Rehman asserts that due process or equal protection under the United States Constitution requires the following:

> A. That the Florida Constitution, which makes the district courts of appeal the courts of last resort in most cases, must provide a right of appeal in all cases to the Florida Supreme Court;
>
> B. That a state court cannot disagree with a *pro se* litigant regarding whether a cited precedent is controlling under the facts of a particular case;
>
> C. That a state cannot promulgate its own court rules to provide that a successor judge has the authority to vacate non-final orders of a predecessor judge, even when the right to appeal remains available;
>
> D. That a state supreme court or other governing entity may not determine that a trial judge who has one

conviction for driving under the influence of alcohol may nonetheless be competent to serve as a judge, even in a case involving a pro se litigant.

Mr. Rehman does not specifically address how the due process clause or the equal protection clause of the United States Constitution impacts on these mostly procedural events. Mr. Rehman cites no precedent from this Court or any other authorities which might even suggest that these mostly procedural events are constitutionally suspect. As a matter of fact, most courts throughout this county have traditionally used all or the vast majority of these procedures and Respondents are unaware of any authorities whatsoever which would condemn them. For these reasons, Respondents are confident that no constitutional rights have been violated in this regard in Mr. Rehman's Florida action and will not comment on them any further.

The only issue raised by Mr. Rehman which merits any discussion at all concerns his assertion that the Florida courts failed to apply a federal statute, 28 U.S.C. § 1367(d), regarding the tolling of a state statute of limitations. Even if the Florida courts misapplied that statute, which they did not do, it is doubtful whether this court should grant certiorari for such an asserted misapplication of a properly stated rule of law. *See* Rule 10, *Rules of the Supreme Court*.

In fact, Florida courts were correct in their application of 28 U.S.C. § 1367(d) since Mr. Rehman's 1990 action in the federal district court against his former employer was filed prior to the effective date of the statute and his subsequent federal district court action filed against some of the instant Respondents was never a "supplemental action" as that term is used in the statute.

Mr. Rehman's libel action was filed in the Florida trial court on May 30, 1994 against Respondents, Allen J. McKenna,

Esquire and Garwood, McKenna & McKenna, P.A. only. On September 16, 1994 Mr. Rehman filed an amended complaint in the Florida trial court naming Respondents, Theodore R. Baumgardner, Esquire and Thomas C. Garwood, Jr., Esquire as additional defendants. In his complaint and amended complaint, Mr. Rehman has alleged that two documents allegedly published by Respondents libeled him. The first alleged libelous publication occurred in 1990 when a "Personnel Separation Notice" was sent by Mr. Rehman's former employer, ECC International Corporation, advising the Department of Defense that Mr. Rehman had been discharged for misconduct. Ultimately, that "Personnel Separation Notice" was amended to simply state that Mr. Rehman had been discharged for poor job performance. The second alleged libelous publication occurred on June 12, 1991 when 108 letters were sent to employees and former employees of Mr. Rehman's former employer advising them of the pendency of Mr. Rehman's lawsuit against the former employer and advising that they might be contacted by Mr. Rehman.

The statute of limitations applicable to an action for defamation, whether libel or slander, is two years from the date of publication. *Fla. Stat.* § 95.11(4)(g). Specifically, the state statute provides as follows:

> Actions other than for recovery of real property shall be commenced as follows:
>
> * * *
>
> (4) within two years:
>
> * * *
>
> (g) an action for libel or slander.

Id. Because Mr. Rehman filed his action almost three years after the date of the last allegedly libelous publication, Mr. Rehman's action was clearly barred by the statute of limitations as a matter of law.

Mr. Rehman has attempted to avoid the application of the two year statute of limitations by arguing that his federal court lawsuits tolled the statute of limitations until such time as the federal courts had resolved those lawsuits. Specifically, Mr. Rehman relies on a tolling provision found at 28 U.S.C. § 1367(d) which provides that the statute of limitations is tolled on supplemental jurisdiction claims until 30 days after a federal court dismisses such supplemental claims. Section 1367 states as follows:

> Except as provided in Subsections (b) and (c) or as expressly provided otherwise by federal statute, in any civil action in which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. [28 U.S.C. § 1367(a)].
>
> The period of limitations for any claim asserted under Subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under

> Subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period. [28 U.S.C. § 1367(d)].

This statute is part of the Judicial Improvements Act of 1990 and, among other things, codifies under the term "supplemental jurisdiction" the case law doctrine of "pendent jurisdiction". Pendent jurisdiction vests in a United States district court the discretion to consider a non-federal claim for which an independent jurisdictional ground does not exist if such non-federal claim is "supplemental" to a federal claim between the same parties properly before the court. This discretion allows the district court's jurisdiction to be invoked when the relationship between the federal claim and state claim permits a conclusion that the entire action before the court comprises but one constitutional case. Black's Law Dictionary 1021 (5th ed. 1979). Pendent jurisdiction is, therefore, a concept whereby a federal district court, in the exercise of jurisdiction over a federal claim properly before it, may also, in its discretion, proceed to extend jurisdiction over a related state law claim where both claims arise from a common nucleus of operative facts. *Id.*

The best interpretation of the doctrine of pendent jurisdiction can be found in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). In *Gibbs*, this Court recognized that in our federal system a plaintiff who has a federal claim against a defendant will often find that the same wrongful conduct that grounded the federal claim has given rise to a claim under state law as well. The Court emphasized that there may be different claims, grounds, and counts, but that they are all in support of what is essentially *a single claim*. *Id.*, 86 S. Ct. at 1137.

While the Judicial Improvements Act of 1990 increases a

federal court's opportunity to impose federal jurisdiction (or at least gives congressional consent to the court-made rule of pendent jurisdiction), inherent in the definition of "supplemental" jurisdiction is the concept that the federal court has original jurisdiction over a federal claim and that judicial economy may require that a claimant's state law claims be decided in the same action as the claim which gives rise to the federal court's original jurisdiction. It is evident, therefore, that in the absence of ***original*** jurisdiction, there can be no "supplemental jurisdiction" to be exercised by the federal district court.

Mr. Rehman asserts that a "whistle blower" action was instituted against his former employer on May 31, 1990. During the course of that litigation, Respondents sent the allegedly libelous letters to employees and former employees of Mr. Rehman's former employer. Mr. Rehman, believing that those letters had libeled him, filed a motion to add some of the instant Respondents as defendants in that action. On August 20, 1992, the district court denied Mr. Rehman's motion stating that if an action were to be pursued against Mr. McKenna and his law firm, it would have to be pursued by a separate action.

On August 31, 1992, Mr. Rehman filed yet another federal court action against some of the instant Respondents, alleging that in 1990 and 1991, Mr. McKenna and his law firm had libeled Mr. Rehman. Almost immediately upon being served with a summons and a copy of the complaint, those Respondents filed a motion to dismiss dated September 22, 1992, advising Mr. Rehman that the federal district court did not have ***any*** jurisdiction since no federal question was presented and there was no diversity of citizenship. Despite being told that the federal district court had no jurisdiction over his action, Mr. Rehman continued to assert that the federal district court did, in fact, have jurisdiction. Mr. Rehman made this argument up to the

time the federal district court dismissed his action on October 7, 1992 and until the Eleventh Circuit Court of Appeals affirmed the district court's finding of no jurisdiction on May 25, 1994. At no time during the pendency of that action did Mr. Rehman attempt to file a state court action for libel against any of the instant Respondents.

Throughout the proceedings below, Mr. Rehman consistently argued that as long as his independent 1992 federal action against Mr. McKenna and the law firm was pending in the federal court system, whether in the district court or the circuit court of appeals, the statute of limitations for libel was tolled pursuant to 28 U.S.C. § 1367(d). These Respondents have consistently argued that § 1367(d) did not toll the statute of limitations while the federal court action against some of the instant Respondents was pending because the federal court never exercised "supplemental jurisdiction" over any claim brought by Mr. Rehman since the federal district court had no jurisdiction whatsoever, whether original or supplemental. If Mr. Rehman would have had a federal claim in addition to his claim for libel and if the federal district court had chosen to exercise its supplemental jurisdiction over the state libel claim, Mr. Rehman would be correct that § 1367(d) would have tolled the statute of limitations relative to the state libel claim. However, Mr. Rehman did not have a federal claim, the federal district court did not have original jurisdiction, and, most importantly, the federal district court did not exercise "supplemental jurisdiction" over Mr. Rehman's state libel claim. Therefore, at least insofar as Mr. Rehman's independent 1992 federal court action against Mr. McKenna and his law firm is concerned, § 1367(d) is totally inapplicable and the statute of limitations was not tolled during the pendency of that independent 1992 federal court action.

A. 28 U.S.C. § 1367 and Mr. Rehman's 1990 Federal Action

Alternatively, Mr. Rehman argued that the prior federal court action against his former employer provides the basis for the tolling of the two year statute of limitations applicable to this action. Mr. Rehman appears to be arguing that because he filed a motion for leave to amend his complaint to add Mr. McKenna and his law firm as defendants in the 1990 federal district court action against Mr. Rehman's former employer, the statute of limitations has been tolled pursuant to § 1367(d), even though the motion was denied and a separate federal court action filed.

As will be more fully discussed below, 28 U.S.C. § 1367(d) does not even apply to Mr. Rehman's 1990 federal court action against his former employer. Even assuming that § 1367(d) did apply, Mr. Rehman can have no reasonable expectation that a federal court of appeals would overturn the federal district court's decision not to exercise supplemental jurisdiction under the circumstances as they existed at the time Mr. Rehman filed his motion to add Mr. McKenna and his law firm as additional defendants. In fact, the Eleventh Circuit Court of Appeals affirmed the district court in that regard.

As stated above, the decision to exercise supplemental jurisdiction is vested within the sound discretion of the federal district court. There is even some doubt as to whether a court of appeals has the authority to review a district court decision denying exercise of supplemental jurisdiction.[2] Even assuming that the court of appeals could reverse a district court's decision not to exercise supplemental jurisdiction under a finding of

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2. *See U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 1005 (11th Cir. 1993). In *U.S. Anchor*, the Eleventh Circuit stated at footnote 31 that it did not need to decide whether § 1367 would allow the court of appeals to decide the propriety of exercising supplemental jurisdiction or whether such discretion is vested in the district court alone. *Id.*

abuse of discretion or clear abuse of discretion, there can be no reasonable expectation that the Eleventh Circuit Court of Appeals would find that the district court in Mr. Rehman's action against his former employer abused its discretion. The district court ruled that the action had been pending for a sufficient period of time that it was already too complex to be burdened by the addition of more defendants. Further, if the district court had allowed the amendment, Mr. McKenna and his law firm, as named defendants in the lawsuit, most likely would have been prohibited from continuing their representation of Mr. Rehman's former employer and the litigation would have been hopelessly stalled by the addition of two new sets of defense attorneys, new defense attorneys for Mr. Rehman's former employers and new defense attorneys to represent Mr. McKenna and his law firm. Under such circumstances, it would be almost impossible to imagine a situation where the Eleventh Circuit Court of Appeals would find that the district court had abused its discretion in denying Mr. Rehman's motion. Further, the Eleventh Circuit Court of Appeals has not even addressed the issue as to whether it has the authority to review that decision.

This Court need not concern itself with either the issue of whether the federal district court's decision to deny exercise of its supplemental jurisdiction or the issue of whether 28 U.S.C. §1367(d) would operate to toll the statute of limitations applicable to Mr. Rehman's libel action. Mr. Rehman's action against his former employer was filed on May 31, 1990. 28 U.S.C. § 1367 is part of the Judicial Improvements Act of 1990 which, according to the terms of that Act, applies to actions commenced "on or after the date of the enactment of this Act". Pub. L. 101-650. In *Yanez v. United States*, 989 F.2d 323, 327 (9th Cir. 1993), the Ninth Circuit stated the following at footnote 3:

> Although Congress has now explicitly

> authorized pendent party jurisdiction ("supplemental jurisdiction"), 28 U.S.C.A. § 1367 (West Supp. 1992), the Section is not retroactive. Section 1367 applies to civil actions commenced on or after Dec. 1, 1990. The Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310(c).

Further, in *United States Anchor Mfg. v. Rule Industries, Inc.*, 7 F.3d 986, 1005 (11th Cir. 1993), the Eleventh Circuit held as follows:

> Under 28 U.S.C. § 1367(d), the statute of limitations would be tolled while the claims were pending until 30 days after an order of dismissal, thus allowing the plaintiff time for filing a new action in state court without a lapse of its rights. But the present case was commenced before the statute's effective date on December 1, 1990, and § 1367 is not retroactive.

Similarly, it is undisputed that Mr. Rehman's federal court action against his former employer was filed on May 31, 1990, prior to the effective date of the Judicial Improvements Act of 1990 and, therefore, prior to the effective date of 28 U.S.C. § 1367(d). Because this statute is not retroactive and does not apply to actions which were commenced before the statute's effective date (December 1, 1990), *United States Anchor*, Mr. Rehman has no argument under § 1367(d) that anything done in his 1990 federal court action against his former employer tolled the statute of limitations. That statute simply does not apply to Mr. Rehman's 1990 federal court action against his former employer and, therefore, Mr. Rehman's state court action for libel filed in May of 1994 was barred by the statute of limitations.

Mr. Rehman filed two federal court actions which he has contended could have tolled the statute of limitations applicable to his libel action against at least some of the instant Respondents. The first of those federal court actions, Mr. Rehman's 1990 action against his former employer, did not toll the running of the statute of limitations since, as outlined above, §1367(d) is not retroactive and does not apply to that action. The second federal action, the 1992 independent action, contained no basis for the federal court to take any jurisdiction, original or supplemental, and, therefore, the second federal action likewise does not provide a tolling of the statute of limitations.

B. 28 U.S.C. § 1367 and the Appellate Process

Additionally, even assuming that § 1367(d) applied to either of Mr. Rehman's federal court actions, it would appear that the statute of limitations applicable to his libel action against these Appellees expired prior to the time he filed his complaint in the state trial court. Section 1367(d) specifically provides that "the period of limitations for any claim asserted under Subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after ***the dismissal of the claim under Subsection (a),*** shall be tolled while the claim is pending and for a period of ***30 days after it is dismissed*** unless State law provides for a longer tolling period." The unambiguous language of the statute, therefore, would require a party seeking to take advantage of the limitations tolling provision of the statute to file his state court action within 30 days of the ***order of dismissal*** and not from any ultimate resolution of the order of dismissal on appeal. At least one commentator has specifically made this observation:

> The dismissal moment should be taken to be the moment of dismissal in the district court. Even if an appeal is taken to a court of appeals

> from the district court dismissal, the party whose claim has been dismissed under § 1367 does best to commence the state action within the prescribed time measured from the district court dismissal, and not from some later appellate affirmance of it. Perhaps, after commencing the state court action in such a situation, the plaintiff can ask the state court to stay the action — now timely commenced and pending — while the federal appeal proceeds.

28 U.S.C.A. § 1367 pp. 828-37 (West 1993).

To Respondents' knowledge, there is no case law which would support an interpretation of § 1367(d) different than the plain wording of the statute. The statute requires a party seeking to take advantage of the limitations tolling provision to file his state court action within 30 days of the order of dismissal in the district court. Therefore, Mr. Rehman's arguments relating to § 1367(d) are simply wrong since he did not file his state court action within 30 days of the denial of his motion for leave to amend in the 1990 action against his former employer and did not file his action within 30 days after the order of dismissal in the subsequent independent 1992 federal action. Simply stated, even assuming that § 1367 applied in this case, Mr. Rehman waited a significantly longer period of time than the 30 days provided in the statute to file his state court action and the state court action was barred by Florida's two-year statute of limitations.

C. Naming Additional Defendants

As stated above, Mr. Rehman filed an amended complaint on September 16, 1994 naming as additional defendants,

Theodore R. Baumgardner, Esquire and Thomas C. Garwood, Jr., Esquire, Mr. Rehman never named and never attempted to name Mr. Baumgardner or Mr. Garwood in either of his federal court actions. Without the tolling effect of § 1367(d) there would be no argument that Mr. Rehman's libel action against Mr. Baumgardner and Mr. Garwood would be barred by the statute of limitations just as it would be against Mr. McKenna and his law firm. Again, even assuming that § 1367(d) applied in this case, there can be no argument advanced that the statute of limitations was tolled as to Mr. Baumgardner and Mr. Garwood since, as stated above, Mr. Rehman never named either of them in either of his federal court actions.

Clearly, the Florida courts were correct in their determination that § 1367(d) did not apply to Mr. Rehman's state court action and that the applicable statute of limitations had expired. Mr. Rehman has not been deprived of any of his federal constitutional or statutory rights.

CONCLUSION

Because this Court lacks jurisdiction due to Petitioner's untimely filing of his Petition for Writ of Certiorari and because none of Petitioner's federal constitutional or statutory rights have been denied by Florida courts, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN E. DUBOSE, JR.
Counsel of Record
WOOLFOLK, ESTES, KEOUGH
& DUBOSE, P.A.
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APPENDIX A — FLORIDA FIFTH DISTRICT COURT OF APPEAL DECISION FILED FEBRUARY 20, 1996

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 1996

CASE NO. 95-1086

DONALD I. REHMAN

Appellant.

v.

GARWOOD, McKENNA & McKENNA, P.A., etc., et al.,

Appellees.

Decision filed February 20, 1996

Appeal from the Circuit Court
for Orange County.
Linda A. Gloeckner, Judge.

Donald I. Rehrnan, Longwood.
pro se.

John E. Dubose, Jr., of Woolfolk, Estes, Keough
& Dubose, P.A., Orlando, for Appellees.

PER CURIAM.

Appendix A

AFFIRMED.

PETERSON. C.J.. DAUKSCH and COBB. JJ. concur.

APPENDIX B — FLORIDA FIFTH DISTRICT COURT OF APPEAL ORDER ENTERED APRIL 2, 1996

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

CASE NO. 95-1086

DONALD I. REHMAN

Appellant,

v.

GARWOOD, McKENNA & McKENNA, P.A., etc., et al.,

Appellee.

DATE: April 2, 1996

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING, and Appellant's MOTION FOR EN BANC REHEARING, filed March 1, 1996, are denied.

I hearby certify that the foregoing is
(a true copy of) the original court order.

s/ Frank J. Habershaw, Clerk
FRANK J. HABERSHAW, CLERK

Appendix B

by: _____
Deputy Clerk

(COURT SEAL)

cc: Donald I. Rehman
John E. Dubose, Jr., Esq.

APPENDIX C — ORDER OF CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT DATED APRIL 20, 1995

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CI 94-3776

DONALD I. REHMAN

Plaintiff,

vs.

GARWOOD, McKENNA & McKENNA, P.A. ALLEN J. McKENNA, THOMAS C. GARWOOD, JR, and THEODORE R. BAUMGARDNER,

Defendants.

ORDER GRANTING DEFENDANTS ALLEN J. MKENNA AND GARWOOD. MCKENNA & MCKENNA. P.A.'S MOTION FOR SUMMARY JUDGMENT AND ENTERING SUMMARY FINAL JUDGMENT

THIS CAUSE having come before the Court on March 16, 1995 on the Motion for Summary Judgment of Defendants, ALLEN J. McKENNA and GARWOOD, McKENNA & McKENNA, P.A., and the Court, having heard argument of Plaintiff and of Defendants' counsel, having reviewed the Court file, and otherwise being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED:

Appendix C

1. The Court finds that Plaintiff's action is barred by the applicable statute of limitations, *Florida Statutes* Section 95.11(4)(g). Plaintiff's 1992 action filed in the United States District Court for the Middle District of Florida was not a "supplemental action" as that term is defined in 28 U.S.C. Section 1367 and, consequently, the tolling provision of said statute does not apply to the instant action. Because the above-captioned case was filed in this Court after the expiration of the statute of limitations, Plaintiff's action against these Defendants is time barred.

2. The Court also finds that the Order of the United States District Court for the Middle District of Florida entered on May 17, 1993 in Plaintiff's action filed in that Court, Case Number 90-425-CIV-ORL-22, collaterally estops Plaintiff from relitigating the issue of the alleged defamatory nature of the 108 letters referred to in Plaintiff's Amended Complaint. The District Court determined they were not and Plaintiff is estopped from relitigating that issue in this Court.

3. Summary Final Judgment, therefore, is entered in favor of Defendants, ALLEN J. McKENNA and GARWOOD, McKENNA & McKENNA, P.A, and against Plaintiff, DONALD I. REHMAN, and Defendants, ALLEN J. McKENNA and GARWOOD, McKENNA & McKENNA, P.A., shall go hence without day. Costs will be taxed upon appropriate Motion and hearing.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this ___ of March, 1995.

s/ Linda A. Gloeckner, Circuit Judge
LINDA A. GLOECKNER, CIRCUIT JUDGE

Appendix C

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail Delivery to **JOHN E. DUBOSE, JR., ESQUIRE,** Post Office Drawer 3751, Orlando, Florida 32802 and to **DONALD I. REHMAN, PRO SE**, 1390 Windy Ridge Court, Longwood, Florida 32750 this day of March, 1995.

_____

JUDICIAL ASSISTANT

APPENDIX D — ORDER OF CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT DATED APRIL 20, 1995

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. 94-3776

DONALD I. REHMAN

Plaintiff,

vs.

GARWOOD, McKENNA & McKENNA, P.A., ALLEN J. McKENNA, THOMAS C. GARWOOD, JR. and THEODORE R. BAUMGARDNER,

Defendants.

ORDER GRANTING DEFENDANTS THEODORE R. BAUMGARDNER AND THOMAS C. GARWOOD JR.'S MOTION FOR SUMMARY JUDGMENT AND ENTERING SUMMARY FINAL JUDGMENT

THIS CAUSE having come before the Court on March 9, 1995 on Defendants THEODORE R. BAUMGARDNER and THOMAS C. GARWOOD, JR.'s Motion for Summary Judgment and the Court, having heard argument of Plaintiff and of Defendants' counsel, having reviewed the Court file, and otherwise being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. The Court makes no determination as to whether

Appendix D

Plaintiff's prior federal court action was a "supplemental action" as that term is referred to in 28 U.S.C. Section 1367. Defendants, THEODORE R. BAUMGARDNER and THOMAS C. GARWOOD, JR., have never been named as Defendants in any of Plaintiff's federal court actions and were not named as parties in the above-captioned action in this Court until September 16, 1994. Clearly the statute of limitations applicable to this action for defamation, *Florida Statutes* Section 95.11(4)(g), expired prior to the filing of Plaintiff's Amended Complaint on September 16, 1994 and such an amendment does not relate back to the filing of any previously filed Complaints. See *Frankowitz v. Proost*, 489 So. 2d 51 (Fla. 4th D.C.A. 1966); *Gray v. Executive Drywall, Inc.*, 520 So. 2d 619 (Fla. 2d D.C.A. 1988); and *R.A. Jones & Sons, Inc. v. Holman*, 470 So. 2d 60 (Fla. 3d D.C.A. 1985).

2. Summary Final Judgment, therefore, is entered in favor of Defendants, THEODORE R. BAUMGARDNER and THOMAS C. GARWOOD, JR., and against Plaintiff, DONALD I. REHMAN, and Defendants, THEODORE R. BAUMGARDNER and THOMAS C. GARWOOD, JR., shall go hence without day. Costs will be taxed upon appropriate Motion and hearing.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this ___ of March, 1995.

s/ LINDA A. GLOECKNER, CIRCUIT JUDGE
LINDA A. GLOECKNER, CIRCUIT JUDGE

Appendix D

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail Delivery to JOHN E. DUBOSE, JR., ESQUIRE, Post Office Drawer 3751, Orlando, Florida 32802 and to DONALD I. REHMAN, PRO SE, 1390 Windy Ridge Court, Longwood, Florida 32750 this ___ day of March, 1995.

_____

JUDICIAL ASSISTANT

APPENDIX E — SUPREME COURT OF FLORIDA DECISION DATED APRIL 18, 1996

SUPREME COURT OF FLORIDA

District Court of Appeal,
5th District - No. 95-1086

CASE NO. 87,744

DONALD I. REHMAN

Petitioner/Appellant,

vs.

GARWOOD, McKENNA & McKENNA, P.A., ETC., ET AL.,

Respondents/Appellees.

Thursday, April 18, 1996

The Supreme Court of Florida does not have common law certiorari jurisdiction. Art. § 3, Fla. Const. The "'Petition for Common Law Certiorari will, therefore, be treated as a petition for discretionary review and/or appeal. *See* Fla. R. App. P. 9.040(c).

Because no jurisdictional basis has been alleged to support the petition for discretionary review of the appeal, this case is hereby dismissed.

The appeal is subject to reinstatement if jurisdiction is established on proper motion filed within fifteen days from the date of this order. *See* Art. V, § 3(b)(1), Fla. Const.

Appendix E

No motion for rehearing or for clarification may be filed in the Court addressed to the denial of the petition for discretionary review. *See* Fla. R. App. P. 3.330(d).

See Vetrick v. Hollander, 464 So.2d 552.

H

cc: Hon. Frank J. Habershaw, Clerk
Hon Fran Carlton, Clerk
Hon. Linda A. Gloeckner, Judge

Mr. Donald I. Rehman
Mr. John E. DuBose, Jr.

A True Copy

TEST:

By

Sid J. White
Clerk Supreme Court

APPENDIX F — SUPREME COURT OF FLORIDA DECISION DATED JUNE 10, 1996

SUPREME COURT OF FLORIDA

District Court of Appeal,
Fifth District
No. 95-1086

CASE NO. 87,744

DONALD I. REHMAN

Appellant.

v.

GARWOOD, McKENNA & McKENNA,
P.A., etc., et al.,

Appellees.

MONDAY, JUNE 10, 1996

Appellant's Motion for Reinstatement filed in the above cause is hereby denied.

OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., concur

TC
cc: Hon. Frank J. Habershaw, Clerk
Hon Fran Carlton, Clerk
Hon. Linda A. Gloeckner, Judge

Appendix F

Mr. Donald I. Rehman
Mr. John E. DuBose, Jr.

A True Copy

TEST:

By

Sid J. White
Clerk Supreme Court

APPENDIX G — MOTION FOR ATTORNEYS FEES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,744

5TH D.C.A. CASE NO.: 95-1086

DONALD I. REHMAN

Petitioner/Appellant

vs.

GARWOOD, McKENNA & McKENNA, P.A., etc., et al.,

Respondents/Appellees.

MOTION FOR ATTORNEYS FEES

Respondents, GARWOOD, MCKENNA & MCKENNA, P.A., ALLEN J. MCKENNA, ESQUIRE, THOMAS C. GARWOOD, JR., ESQUIRE and THEODORE R. BAUMGARDNER, ESQUIRE, by and through their undersigned attorneys, move the Court for entry of an Order awarding attorneys fees pursuant to *Florida Statutes* Section 57.105(1) and in support thereof would state as follows:

1. This case involves the Petition for Discretionary Review and/or Appeal filed by Petitioner, DONALD I. REHMAN. Mr. Rehman's Petition seeks review of the Fifth District Court of Appeal's decision entered February 20, 1996 affirming summary judgments entered in favor of the Respondents in the trial court. The Fifth District Court of Appeal's decision affirms those summary judgments by simply stating "PER CURIAM AFFIRMED."

2. This Court has long held that it does not have subject matter jurisdiction over decisions of district courts of appeal rendered without opinion or citation but merely rendered with the words 'per curiam affirmed". *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980); *Dodi Pub. Co. v. Editorial America S.A.*, 385 So. 2d 1369 (Fla. 1980); *Robles Del Mar, Inc. v. Town of Indian River Shores*, 385 So. 2d 1371 (Fla. 1980); *Jollie v. State*, 405 So. 2d 418 (Fla. 1981); *The Florida Star v. B.G.F.*, 530 So. 2d 286 (Fla. 1988).

3. The filing of a Petition for Discretionary Review and/or Appeal in a case where the district court has entered a "per curiam affirmed" opinion is frivolous as a matter of law since there is no justiciable issue of either law or fact regarding the absence of this Court's subject matter jurisdiction.

4. *Florida Statutes* Section 57.105(1) provides as follows:

> The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client. If the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the defense, the court shall also award pre-judgment interest.

5. This statute is mandatory, requiring a court to award the prevailing party attorney's fees in any action in which there is a complete absence of a justiciable issue of either law or fact. *See e.g. Sykes v. St. Andrew's School*, 625 So. 2d 1317 (Fla. 4th D.C.A. 1993).

6. *Florida Statutes* Section 57.105(1) has been construed to apply to appeals where there is no justiciable issue on appeal. *See Branch v. Charlotte County*, 627 So. 2d 577 (Fla. 2d D.C.A. 1993); *Sykes, supra; Parker v. Parker*, 585 So. 2d 328 (Fla.4th D.C.A. 1991).

7. Because this Court clearly lacks subject matter jurisdiction to entertain discretionary review and/or appeal of a district court's decision rendered without opinion or citation, the filing of a such a Petition for Discretionary Review and/or Appeal is frivolous and these Respondents are entitled to recover their reasonable attorneys fees in defending the matter.

WHEREFORE Respondents, GARWOOD, MCKENNA & MCKENNA, P.A., ALLEN J. MCKENNA, ESQUIRE, THOMAS C. GARWOOD, JR., ESQUIRE and THEODORE R. BAUMGARDNER, ESQUIRE, respectfully move the Court for entry of an Order awarding attorneys fees.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail Delivery to DONALD I. REHMAN, 1390 Windy Ridge Court, Longwood, Florida 32750 this 29 day of April, 1996.

Appendix G

s/ John E. Dubose, Jr.,
JOHN E. DUBOSE, JR., ESQUIRE
WOOLFOLK, ESTES, KEOUGH
& DUBOSE, P.A.
Landmark Center One
315 East Robinson St., Suite 555
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(407) 849-6580
Florida Bar No. 0752037
Attorney for Respondents

APPENDIX H — SUPREME COURT OF FLORIDA ORDER DATED JULY 19, 1996

SUPREME COURT OF FLORIDA

CASE NO. 87,744

DAVID I. REHMAN

Petitioner,

v.

GARWOOD, MCKENNA & MCKENNA, P.A., ETC., ET AL.,

Respondents.

FRIDAY, JULY 19, 1996

Upon consideration of the Motion for Attorney's Fees filed in the above styled cause by the attorney for Respondents',

IT IS ORDERED that said Motion is granted and said attorney is allowed a fee of one thousand dollars ($1,000.00) for services in this Court, said sum to be paid to said attorney by Petitioner.

OVERTON, SHAW, HARDING and WELLS, JJ., concur
ANSTEAD, J., dissents

H

cc: Mr. Johnny Euell DuBose, Jr.
Mr. Donald I. Rehman

Appendix H

A True Copy

TEST:

By

Sid J. White
Clerk Supreme Court